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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-237

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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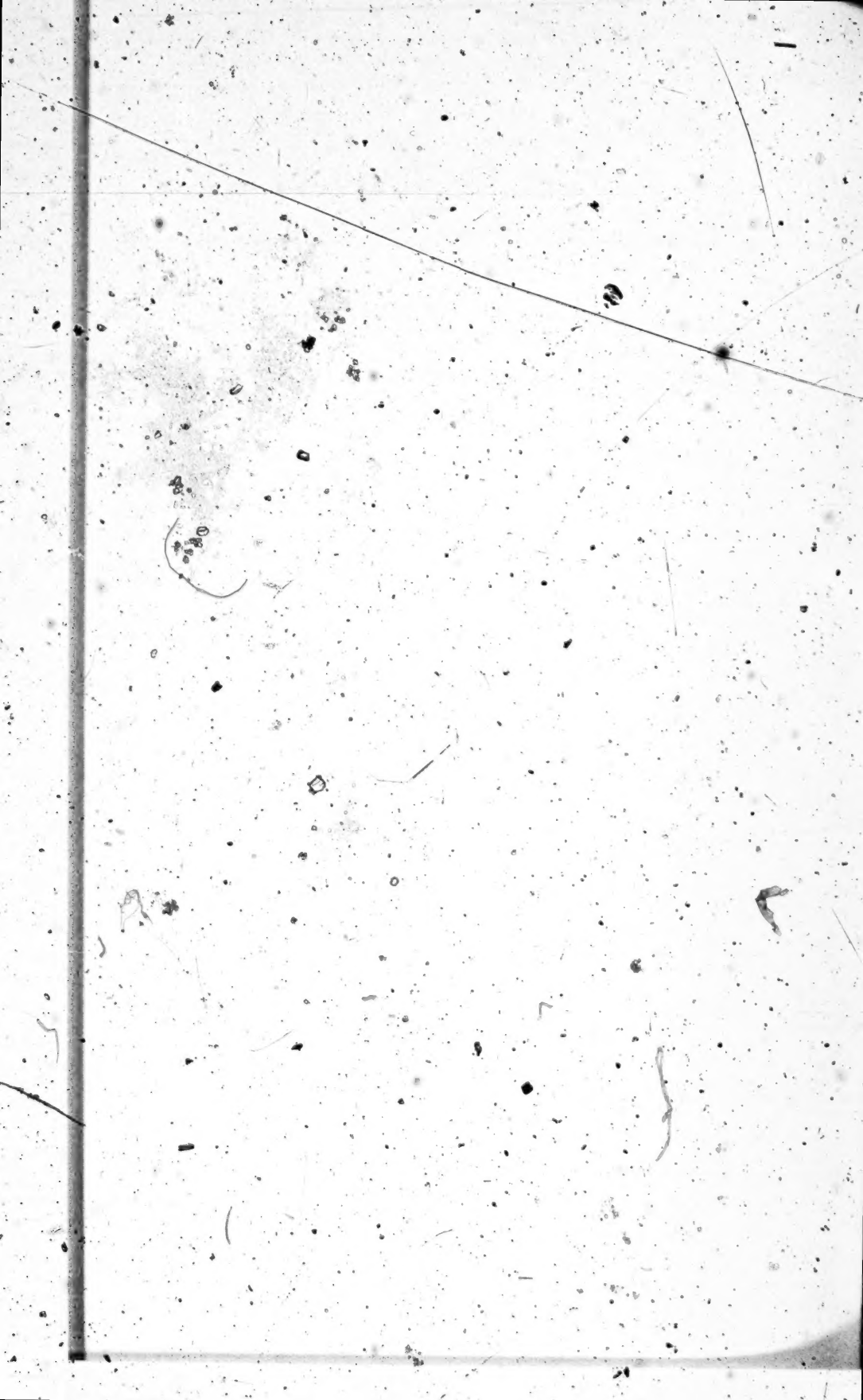

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ....

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. William C. Stubbs* v. *Mancusi*. The judgment was entered on April 19, 1971. Rehearing was denied on May 19, 1971, Judge Moore dissenting; on the same day, the petition for rehearing *in banc* was denied.

Opinions and Orders Below

The orders of the United States Court of Appeals denying the petition for rehearing and rehearing *in banc* are reproduced as Appendix A and Appendix B to this petition. The opinion of the United States Court of Appeals

for the Second Circuit is reported at 442 F. 2d 561, appended hereto as Appendix C. The opinion of the United States District Court for the Western District of New York is not yet reported and is appended hereto as Appendix D.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 19, 1971 reversing the denial of respondent's petition for a writ of habeas corpus by the United States District Court for the Western District of New York. A petition for rehearing or rehearing *in banc* was denied by the Court of Appeals on May 19, 1971.

Questions Presented

1. Whether the rule of due diligence in obtaining the presence of an absent witness precludes the use of prior recorded testimony of a witness who was a permanent resident of another country at the time of respondent's second trial for murder in Tennessee?

2. Whether respondent's right of confrontation was violated at his second trial for murder by the introduction of prior recorded testimony of an unavailable witness, where that testimony had been subject to cross-examination by competent counsel but the trial had later been vacated because counsel had been tardily appointed?

3. Whether the introduction of prior recorded testimony at respondent's second trial was harmless beyond a reasonable doubt, where respondent himself testified at the retrial that he had forced the murder victim and her husband into a car at gunpoint and compelled them to drive to the spot where the shooting occurred?

4. Whether every reasonable hypothesis except guilt must be excluded in order to sustain a conviction on collateral review?

Statement

A

Respondent was convicted in Monroe County, New York in 1966 for assault in the first degree and possession of a firearm. On October 7, 1966 he was sentenced as a second offender to a term of 19-20 years on the assault charge, and 13-14 years on the firearms charge, the sentences to run consecutively.

On June 24, 1968 the Appellate Division, Fourth Department affirmed the conviction without opinion (30 A. D. 2d 777) and reargument was denied on September 19, 1968 (30 A. D. 2d 932). Leave to appeal was subsequently denied by the New York Court of Appeals. On February 24, 1969, this Court denied certiorari (393 U. S. 1108).

The increased punishment imposed upon respondent by the Monroe County Court was predicated upon a 1964 Tennessee conviction upon re-trial for first degree murder on June 11, 1954. Respondent had originally been convicted of the same murder charge in July 1954; however, the original conviction had been reversed by the United States District Court for the Middle District of Tennessee on January 6, 1964 in a habeas corpus proceeding on the grounds of tardy appointment of counsel. *Stubbs* v. *Bomar* (Civil Action 3585, M. D. Tenn.)

B

The crime of which appellant Stubbs was convicted in Tennessee was the murder of Mrs. Alex Holm on June 11, 1954. At the 1964 retrial, Burl A. Holm testified that his parents, Alex and Ruby Holm were driving their car

from their home in Texas through Tennessee; their destination was Providence, Rhode Island, and from that point, they were to fly to Sweden. They met Stubbs at a roadside park between Rutledge and Rogersville, Tennessee, where they had stopped for a picnic lunch.

Stubbs testified that he had been discharged from Texas State Penitentiary in June, 1954 and that he was without money, and was hitchhiking through the South. He had been given a gun by a friend who had been a fellow inmate in prison, and had this gun in his possession when he met Mr. and Mrs. Holm. After their refusal to give him a lift, he forced them at gun point to get into the back seat of their car. With the gun in his hand at intervals pointing into Mrs. Holm's face or on the front seat, Stubbs drove the car through Rogersville, Kingsport and Blountville, Tennessee. Stubbs testified that near Bristol, Tennessee:

> "It seems awful strange, but everything just seemed to be awful still and I remember a tree and it just seemed to come up just like that in a clear focus, but in a reddish haze. I mean there was no pain or nothing . . . I felt a sharp pain that seemed to start in my head and go all the way down through me and I reached up with both hands and heard this loud roar, bang . . . Stuff started down my face and down my shirt and all that I could think of that he has got the gun . . . I just went outside through the car door (onto the highway)."

After that, Stubbs ran away to the woods, "everything went black" and he awoke after sundown. A passing driver, Mr. Bernie Webb* gave him a lift and they were stopped at a roadblock. Mr. Webb suggested to officers at the roadblock that Stubbs be investigated. He was

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* Mr. Webb testified that he had picked Stubbs up on the highway, that his shirt was bloody and that they were stopped by the roadblock.

taken to Bristol Jail in handcuffs, then escorted within an hour to the hospital where several head wounds were treated.

Stubbs went on to state that he was taken to Mr. Holm's room in the hospital and that a man (whom he did not recognize as Holm at the time) pointed to him and said: "[T]hat is the one." He denied knowledge that Mrs. Holm was dead, claiming that he was hit on the head and that he did not shoot Mrs. Holm.

Captain Frank Williamson of the Tennessee Highway Patrol testified that on June 11, 1954 he received information about a wrecked car near Blountville. He went to the scene and found an old model Ford with blood inside and the door open. A woman had been shot and a man injured.

Sergeant Seahorn of the Tennessee Highway Patrol testified that after the shooting they were checking cars at a highway roadblock and that when Mr. Webb and appellant Stubbs drove up, Stubbs was arrested. Sergeant Seahorn told Stubbs that he was under arrest in connection with a murder. At the time, appellant had blood on the front of his shirt and his clothes were torn. He explained this blood by saying that he had been fishing and had fallen off a rock cliff. He was searched, and an empty bullet shell and knife were found. Sergeant Seahorn further testified that Stubbs was taken to City Jail and then to the hospital room of Alex Holm, where (in the presence of several other police officers) Holm pointed at Stubbs and said "[T]hat is the man that killed my wife and shot me".

Their testimony was corroborated by Captain Williamson and Sergeant H. P. Montgomery of the Tennessee Highway Patrol. Sergeant Montgomery further said that at the time that Holm identified Stubbs, there was ample light in the room.

Dr. Franklin Buchanan, who attended Alex Holm in the Emergency Room of Memorial Hospital, testified that two bullets had entered Mr. Holm's face, one lodging in the neck, and the other in the nasal passage; both bullets were removed. Despite this injury and the discomfort, Mr. Holm's faculties were intact and his eyes were good; he had brought his glasses with him to the hospital. He identified Stubbs as his assailant. Dr. Charles Harkrader, Jr. testified to the same effect as to Holm's conscious and rational state.

The testimony of Alex Holm, given at Stubbs' 1954 trial, was read into the transcript at the 1964 trial, over counsel's objections; Mr. Holm had in the meantime become a permanent resident of Sweden. Holm had identified Stubbs in court, and had testified that Stubbs had forced him and his wife into their car at gunpoint and threatened to kill them. Stubbs drove the car, keeping his gun in his lap pointed towards them. Mr. and Mrs. Holm were carrying $1,400.00 in traveler's checks and cash. Stubbs began shooting when they were slightly east of Blountville, twice at Holm and once at Mrs. Holm. Holm seized the gun after Stubbs had begun to shoot, another shot went off, and Holm hit Stubbs on the head with the gun 3 or 4 times. Mrs. Holm's body slumped over and Stubbs got out of the car and ran away.

C

Respondent commenced the instant proceeding in the Western District of New York by means of a petition for a writ of habeas corpus. His petition contained ten claims, nine of them directed toward his Monroe County trial and conviction. Respondent's tenth claim was that the 1964 Tennessee conviction was unconstitutionally obtained and as such should not have been made the basis for increased punishment. Respondent alleged that the 1964 Tennessee conviction had been obtained in violation of his Sixth Amendment right of confrontation.

After having examined the record on appeal in the New York Courts, the District Court denied all of respondent's claims on the merits (see Appendix D). On October 7, 1969 the Court of Appeals for the Second Circuit granted respondent a certificate of probable cause, leave to appeal *in forma pauperis* and assignment of counsel. The Court limited the issue on appeal to the constitutionality of the 1964 Tennessee conviction.

On April 19, 1971, the Court below rendered its decision, reversing the decision of the United States District Court. The Court held that respondent had been deprived of his right of confrontation at the Tennessee retrial for murder, because the testimony of a witness proven to be residing in Sweden was read into the record, and because counsel at the first trial had been tardily appointed and had not attempted to establish that after Stubbs had kidnapped the Holms at gunpoint, they had made him welcome as a "guest" (7a-8a).*

The court further held that although respondent had himself testified at the retrial that he had forced Mr. and Mrs. Holm into a car at gunpoint and compelled them to drive to the spot where the shooting occurred, the harmless error doctrine did not apply because there was an absence of testimony on the part of Holm as to whether the kidnapper had become their "guest", and thus a reasonable hypothesis as to the shooting could still be conceived (8a).

Reasons for Allowance of Writ

1. The decision below constitutes a significant departure from the prior decisions of this Court.

A

The court below, citing this Court's decision in *Barber v. Page*, 390 U. S. 719 (1968), held that "[a]bsence from

*Numbers in parentheses refer to the appendix herein.

the continental United States is not per se a sufficient reason to broaden the exception to the Confrontation Clause allowing the admission of prior testimony of a presently unavailable witness'' (7a). In so ruling, the court misapprehended the rationale in Barber, which dealt with the issue of whether a defendant's right of confrontation was denied at his trial by the reading of preliminary hearing testimony of a witness who was then imprisoned in another State. Since the absent witness was incarcerated in a federal prison in Texas, 225 miles from the trial court, it is clear that this Court's decision was directed toward a situation where it was legally and physically possible to produce the missing witness.

Thus, this Court observed that increased cooperation between the States themselves and the federal government had largely diminished the theory that absence from a jurisdiction was a ground for dispensing with confrontation because the process of a trial court could not go beyond its territorial limits. It was also noted that in the case of prospective witnesses in federal custody, the federal courts had the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities, and that the United States Bureau of Prisons permitted federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus *ad testificandum* issued out of state courts.

By contrast, the prior recorded testimony of the witness in the case at bar was that of an elderly man of Swedish nationality who had returned to and become a permanent resident of Sweden and, therefore, was not available to Tennessee for respondent's retrial for first degree murder. Respondent's position is that this fact alone invalidates his Tennessee conviction and precludes its use as a predicate for finding him a second felony offender after conviction in Monroe County, New York, of first degree assault and possession of a firearm. This situation is totally unlike *Barber,* but similar to several other recent decisions where

a witness was demonstrated to be living on a foreign continent at the time of trial.

In *People* v. *Benjamin*, 83 Cal. Rptr. 764 (Ct. of App. 1970), for example, defendant claimed at his trial for robbery in the second degree, that the introduction of preliminary hearing testimony of a missing witness violated his right of confrontation. The prosecution established that it had been advised by a legal officer of the Marine Corps that the missing witness was on military duty in Vietnam and would be unavailable for trial. On the basis of this evidence, the Court of Appeals upheld the trial judge's finding that the witness was unavailable as a matter of law and that reasonable diligence would not have caused him to appear as a witness. Accordingly, the admission of the witness' pre-trial testimony was found to be proper.

And in *People* v. *Ashford*, 71 Cal. Rptr. 619 (Ct. of App. 1968), the missing witness had testified against defendant in a retrial for robbery in the second degree, and been cross-examined at a preliminary hearing and a prior trial. At the time of defendant's second trial, the missing witness was at a convention in Florida, and was thereafter planning to travel in the Caribbean and in the western United States. While the Court noted that the better practice would have been to adjourn the second trial until the missing witness returned to California, it upheld defendant's conviction on the ground that he was not deprived of his full Sixth Amendment right of confrontation, but only that aspect of the right of confrontation which entitled him to have the trier of fact observe the witness' demeanor while being subjected to interrogation.

In *Goldwasser* v. *Brown*, 417 F. 2d 1169 (D. C. Cir. 1969), a former English teacher sought review of a proceeding in which he was discharged from civilian service with the Air Force for having made unauthorized statements to his students. The students were foreign military officers who

had subsequently returned to their native countries at the time the disciplinary hearing took place. Notwithstanding plaintiff's argument that the hearing was defective because these witnesses should have been produced by the Air Force upon his request, the Court stated that plaintiff's access to these witnesses prior to their departure from the United States prevented plaintiff from claiming unfairness at the hearing amounting to a violation of the Constitution. The Court noted that the Civil Service Commission did not have subpoena power to compel the attendance of witnesses, and further noted that these foreign students were not under the control of the Air Force.

Cases which have found that due diligence should have been exercised to obtain the presence of an absent witness, have involved situations where the witness might have been in the jurisdiction (*Holman* v. *Washington*, 364 F. 2d 618 [5th Cir. 1966]; *Wilson* v. *Bowie*, 408 F. 2d 1105 [9th Cir. 1969]; and *Government of Virgin Islands* v. *Aquino*, 378 F. 2d 540, 551 [3rd Cir. 1967]). In *Aquino*, for example, the witness was a stewardess on a Norwegian freighter. The Court there held:

> "So far as the record shows, therefore, the complainant might have been residing continuously in the Virgin Islands ever since the preliminary hearing was held. She might have been aboard a vessel which was in St. Thomas at the time of trial. *In these circumstances* it cannot be said that the prosecution satisfactorily established the burden which rested on it to show that she was unavailable at the time of trial." (Emphasis added.)

In the instant case the State of Tennessee ascertained the location of the missing witness and introduced testimony as to his whereabouts. Having established that the missing witness was permanently residing in Ekskogen, Sweden, there was little more the prosecution could have

done in view of the great distance between Sweden and the place of trial (approximately 4,000 miles), the expense of travel from such a distance, and the witness' immunity from any form of process issued by the State of Tennessee. The Supreme Court of Tennessee, in affirming the Tennessee conviction (*Stubbs* v. *State,* 216 Tenn. 567, 393 S.W. 2d 150), held at 154:

> "The Uniform Law to Secure Attendance of Witnesses, T.C.A. § 40-2429 et seq., is limited to apply to any state, territory of the United States or District of Columbia. The Criminal Court of Sullivan County, who tried Stubbs, had no effective or compulsory process in Ekskogen, Sweden."

The Court referred to 15 A.L.R. at page 517 for the rule that:

> "It seems logical to hold that, if death permits the reproduction of the testimony of the witness, his absence beyond the jurisdiction of the court, so that his presence cannot be secured at the trial, would require the same result. The courts have quite generally adopted such ruling."

It is clear that no "due diligence" rule can properly be applied here.

B

The Court below also held that tardy appointment of counsel at respondent's first trial deprived respondent of his right of confrontation, in clear contravention of this Court's holding in *Chambers* v. *Maroney,* 399 U.S. 42 (1970), that tardy appointment of counsel *per se* neither requires reversal of every conviction nor an evidentiary hearing to determine whether the right to counsel has been violated. This Court also noted:

> "No charge is made that [counsel] was incompetent or inexperienced, rather the claim is that his appear-

ance for petitioner was so belated that he could not have furnished effective legal assistance at the second trial." (399 U. S. at 53.)

In the instant case, respondent's first trial had been vacated by the United States District Court for the Middle District of Tennessee* solely on the grounds that there was insufficient time to prepare a defense. Respondent was represented by three members of the Bar and the recorded testimony read into the 1964 trial transcript indicates that these attorneys handled the examination of the complaining witness capably.

Mr. McInturff, one of the three counsel, made numerous objections during the course of Mr. Holm's testimony. The cross-examination was handled by a co-counsel, Mr. Taylor, who attempted to show that respondent had no intention of killing anyone; Mr. Taylor questioned Alex Holm closely as to whether defendant could have shot both him and his wife and taken their car when they first encountered each other at the picnic site. Counsel further attempted to establish that respondent had told Holm and his wife that all he wanted was a ride to Bristol.

Thus, it is plain on the record that respondent's 1954 counsel did in fact effectively cross-examine Alex Holm. Indeed, the suggestions of respondent's later attorneys at his retrial as to how they would have handled the cross-examination do not significantly improve upon the earlier trial techniques used. Most of the suggestions involved merely minor points, except that counsel would have asked Mr. Holm whether he carried insurance on his wife's life. This kind of attempt to impugn Mr. Holm could have been utilized by his 1954 counsel, as it would have taken no preparation time; however, it is probable that as a matter of strategy, Mr. McInturff and Mr. Taylor did not do so because they felt it would further antagonize the jury. Mr.

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* *Stubbs* v. *Bomar* (Civil action 3585, M.D. Tenn.).

Holm had himself been shot twice in the face and an attempt to insult him would only have underlined his personal tragedy.

The courts below suggested that the cross-examination was defective because counsel had failed to ask Mr. Holm whether the kidnapper had been made "welcome" once the Holms grew better acquainted with him (8a). This line of questioning would not, of course, have needed any preparation time and thus the tardy appointment of counsel is irrelevant in assessing cross-examination; moreover, such questioning would also have been rejected by trial counsel as a matter of strategy, since it would have appeared to the jury to be sarcastic. As to such strategic decisions, the attorney must be the manager of the lawsuit. *Williams* v. *Beto,* 354 F. 2d 698 (5th Cir. 1965); *Nelson* v. *People of the State of California,* 346 F. 2d 73, 81 (9th Cir. 1965), *cert. denied* 382 U.S. 963.

In addition to the opportunity to cross-examine, the other important benefits included in the right to confrontation were also preserved in respondent's 1954 trial. As summarized in this Court's decision in *California* v. *Green,* 399 U.S. 149 (1970), the defendant must have an opportunity to confront the witness personally in order to test his recollection; sift his conscience; compel him to stand face to face with the jury so that they can judge his demeanor; and to compel him to testify under oath with knowledge of the penalty for perjury. All these factors were present when Holm originally testified.

This Court recently indicated in *Dutton* v. *Evans,* —— U. S. ——, 91 S. Ct. 210, 220 (1970):

> "The decisions of this Court made it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluat-

ing the truth of his prior statement.' California v. Green, 399 U. S. at 161, 90 S. Ct. at 1936."

Such accuracy is assured in the case at bar. Justice Harlan's concurring opinion in *Dutton* (91 S. Ct. at 223), also indicated that *California* v. *Green* should not be interpreted so as to require the prosecutor to produce available witnesses in preference to other types of proof.

Thus, no basis remains for the exclusion of Holm's testimony from the 1964 retrial.

2. The decision below conflicts with the law in four other circuits.

In ruling that respondent's own testimony admitting the gun-point kidnapping of Mr. and Mrs. Holm, was insufficient in itself to sustain his Tennessee conviction because another hypothesis as to the shooting might be conceived, the court below in effect eliminated the harmless error rule except where a federal court finds that the trial jury could have reached no other conclusion but guilt—a more rigorous standard than is applied on direct appeal. This interpretation is in conflict with the law of four other circuits, which have held unequivocally that even where a prosecution is based upon circumstantial evidence (rather than defendant's own testimony, as here), it is not necessary to preclude every reasonable hypothesis except guilt in order to uphold a conviction. *United States* v. *Boyle*, 402 F. 2d 757 (3rd Cir. 1968), *cert. denied* 394 U.S. 934; *United States* v. *Chappell*, 353 F. 2d 83 (4th Cir. 1965); *United States* v. *Luxemberg*, 374 F. 2d 241 (6th Cir. 1967); *Bailey* v. *United States*, 410 F. 2d 1209 (10th Cir. 1969), *cert. denied sub nom. Freeman* v. *United States*, 396 U.S. 933; *Early* v. *United States*, 394 F. 2d 117 (10th Cir. 1968), *cert. denied* 393 U.S. 1003; *Golubin* v. *United States*, 393 F. 2d 590 (10th Cir. 1968), *cert. denied* 393 U.S. 831.

It is important to note that Mr. Holm's testimony was cumulative on the question of Stubbs' identity, the owner-

ip of the gun and the fact of the kidnapping. Even if olm had been murdered like his wife, rather than shot ice in the face, Stubbs' own testimony alone could clearly ve supported the verdict. However, the court below held at the *absence* of testimony on the part of Holm as to ether Stubbs had "gained their sympathy during the urse of the trip and in effect became their guest" was t "harmless beyond a reasonable doubt" (8a). The cond Circuit's rationale was that since the "guest" eory was "the core of Stubbs' defense",* cross-examina-n of Holm on this point was "central" because it might ve supported Stubbs' claim.

Analysis of Stubbs' testimony alone renders the hypoth-s that his victims made him welcome wholly impos-le to support. Despite his attempts to persuade the lms to allow him to ride with them, he was categorically used—until he threatened them with his gun. Stubbs d no job prospects and no money and no particular tination to which he merely needed transportation. The lms' suggestion that he "put his gun on the seat [of car]" (8a) was an alternative to his pointing it into s. Holm's face rather than an expression of friendship. e final refutation of the "guest" theory was Stubbs' n testimony that he was struck on the head as they drove ng—hardly the act of a host.

The Tennessee Supreme Court pointed out that Stubbs admitted that "he forced Axel Holm and his wife at tol point to get into the back seat of their automobile" 3 S. W. 2d at 155). Both the Tennessee shooting and New York conviction for assault in the first degree and session of a firearm, involved crimes of brutal violence.

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* The trial transcript, however, indicates that the "core" of the nse was that Stubbs had suddenly been struck on the head as drove along, that he heard a roar, and then he felt a pain and away.

As noted by Judge Moore in the dissenting opinion below (9a):

> "Here is presented an extraordinary example of 'justice' dispensed by the federal courts. Stubbs, the appellant, released from a Texas penitentiary in June 1954, a few days later kidnapped at gunpoint in Tennessee a Mr. and Mrs. Holm and forced them to accompany him in their car. While on the road he murdered Mrs. Holm apparently 'in cold blood' and attempted to murder Mr. Holm, wounding him twice. Stubbs was apprehended shortly thereafter at a roadblock. He tried to explain the blood on his clothing by attributing it to an accident while fishing. Stubbs was taken to the hospital to which Holm had been taken. There, in the presence of police officers and a doctor, Holm identified Stubbs as 'the man that killed my wife and shot me.'"

Judge Moore also noted:

> "Stubbs is not seeking relief from his Tennessee conviction as such but simply from its use to support a longer sentence for his subsequent New York conviction. The attack now made on the Tennessee conviction is purely collateral."

It is respectfully urged that, in requiring appellant to exclude every reasonable hypothesis except guilt in order to show the applicability of harmless error, the court below not only contravened precedent in other circuits but has also held the State to such a stringent standard that virtually any trial error would mandate invalidation of the State conviction. Thus, the harmless error doctrine, *Harrington* v. *California*, 395 U.S. 250 (1960), which is designed to avoid the necessity for setting aside convictions for small errors or defects that have little likelihood of having changed the trial result, would be seriously undermined.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: New York, New York, August 12, 1971.

Respectfully submitted,

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Appendix A—Denial of Petition for Rehearing.

34449

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES ex rel. WILLIAM C. STUBBS,

Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,

Respondent-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY

ARLIN M. ADAMS

Circuit Judges

LEONARD P. MOORE, U.S.C.J.
dissents.

May 19, 1971.

Appendix B—Denial of Petition of Rehearing In Banc.

34449

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES ex rel. WILLIAM C. STUBBS,

Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,

Respondent-Appellee.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

May 19, 1971.

Appendix C—Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 126—September Term, 1970.

(Argued October 26, 1970 Decided April 19, 1971.)

Docket No. 34449

UNITED STATES OF AMERICA *ex rel.* WILLIAM C. STUBBS,

Petitioner-Appellant,

—against—

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Respondent-Appellee.

Before:

MOORE, FRIENDLY and ADAMS,*

Circuit Judges.

Appeal from denial of petition for habeas corpus by the District Court for the Western District of New York, Harold P. Burke, *Judge,* challenging sentence imposed as second felony offender.

Reversed.

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* United States Circuit Judge of the Court of Appeals for the Third Circuit, sitting by designation.

Appendix C—Decision of the United States Court of Appeals for the Second Circuit.

BRUCE K. CARPENTER, Dunkirk, New York (Woodin & Carpenter, Dunkirk, New York, of counsel), *for Petitioner-Appellant.*

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ADAMS, *Circuit Judge:*

Relator Stubbs was convicted in Monroe County, New York in 1966 for first degree assault and possession of a firearm. The County Court considered a prior conviction of murder obtained against Stubbs in Tennessee, found him to be a second felony offender, and sentenced him to consecutive terms of imprisonment totalling thirty-two to thirty-four years.[1] Stubbs here challenges his sentence, alleging that his prior felony conviction in Tennessee was constitutionally invalid. The Honorable Harold P. Burke, District Judge of the District Court for the Western District of New York, denied Stubbs' application for a writ of habeas corpus, and relator appealed.

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[1] Under former New York Penal Law, §§ 241, 1897 [present New York Penal Law §§ 120.10, 265.05 (McKinney 1967)], Stubbs could have been sentenced to a maximum of seventeen years as a first felony offender on these charges. The sentence was increased under the authority of former Penal Law § 1941 (compare present § 70.10). Stubbs was also convicted of the felony of breaking and entering in Texas in 1953. As far as the record in the present case reveals, the 1953 conviction remains available as a predicate for increased punishment under § 1941. Present Penal Law § 70.10 would not govern resentencing because of the effective date expressed in § 5.05. Cf. *Gerberding* v. *Swenson*, 435 F.2d 368 (8th Cir. 1970).

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Stubbs was first convicted of a vicious murder in Tennessee in 1954. This conviction was vacated in 1964 when the Honorable William E. Miller, United States District Court for the Middle District of Tennessee, found Stubbs to have been denied, because of late appointment, the effective assistance of counsel. *Stubbs* v. *Bomar,* Civil Action 3585 (M.D. Tenn., filed January 6, 1964). At retrial, the prosecution's primary witness did not appear, but his testimony from the first trial was read over defense objections, and Stubbs was convicted. This conviction was upheld by the Supreme Court of Tennessee. *Stubbs* v. *State,* 216 Tenn. 567 (1965).

The critical issue before us is whether relator's 1964 Tennessee conviction was obtained in violation of his right —under the Sixth Amendment to the Constitution—to be confronted with the witnesses against him, and thus was an improper predicate for increased punishment.[2]

The facts underlying the Tennessee conviction are as follows: Mr. and Mrs. Holm were driving through Tennessee on their way from Texas to Rhode Island for an eventual journey to Sweden. Stubbs asked Mr. and Mrs. Holm at a roadside park for a ride, but was refused. He then forced them at gunpoint to permit him to drive their car while the Holms rode in the back seat. Stubbs claimed that when they were near Bristol, Tennessee, he was suddenly struck on the head and he heard a loud bang, the car hit a tree and Stubbs then fled. The police were called to investigate the wrecked car, and they found Mrs. Holm dead by a gunshot wound, and Mr. Holm shot twice in the face. Stubbs was soon apprehended in a police road-block. From his hospital bed, Mr. Holm identified Stubbs as the man who shot him and his wife. Three days before his trial, three attorneys were appointed to defend Stubbs,

[2] See *Burgett* v. *Texas,* 389 U.S. 109 (1967).

and they requested and were refused a continuance to prepare the defense. At trial, Mr. Holm was the state's primary witness, and Stubbs was convicted.

By the time of the 1964 retrial, Mr. Holm had become a permanent resident of Sweden, but had not relinquished his American citizenship. No effort was made by the state to obtain Holm's attendance at this trial. Instead, Holm's son was brought from Texas to testify that his father was presently residing in Sweden whereupon Holm's prior testimony was admitted over objection.[3] The propriety of the admission of that evidence, in light of *Barber* v. *Page*, 390 U.S. 719 (1968) and *California* v. *Green*, 399 U.S. 149 (1970), is here in question.[4]

As noted by the Supreme Court in *Green*, "the particular vice which gave impetus to the [Confrontation Clause] was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." 399 U.S. at 156. A traditional exception to the confrontation requirement has been the introduction of testimony of a witness who is now unavailable, but who previously testified subject to cross-examination at judicial proceedings against the same defendant. E.g., *Mattox* v. *United States*, 156 U.S. 237 (1895). While the scope of the Confrontation Clause is not coextensive with the rules of hearsay and their exceptions,[5]

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[3] *See generally* 5 Wigmore, *Evidence*, §§ 1396, 1404 (3d ed. 1940); *Note, Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966).

[4] In *Berger* v. *California*, 393 U.S. 314 (1969), the Supreme Court directed that *Barber* v. *Page* should "be given fully retroactive application."

[5] *California* v. *Green*, *supra*, at 155-156.

"necessity"[6] is a factor common to both that may justify the use of prior recorded testimony in limited instances of genuine unavailability. The test for such use is whether "the prosecutional authorities have made a good-faith effort to obtain [the witness'] presence at trial." *Barber* v. *Page, supra* at 725. No such effort was made here, and Holm's testimony was improperly admitted into evidence. Where there is no showing that a witness beyond the effective reach of a court's subpoena will refuse to return voluntarily to testify if requested, the prosecution may not introduce prior testimony without demonstrating a reasonable effort to secure his presence. Cf. *Virgin Islands* v. *Aquino*, 378 F.2d 540 (3rd Cir. 1967); *Owens* v. *Eyman*, 434 F.2d 1962 (9th Cir. 1970). Absence from the continental United States is not per se a sufficient reason to broaden the exception to the Confrontation Clause allowing the admission of prior testimony of a presently unavailable witness. For although there is a much greater chance that it will not be possible to bring before the court a witness residing abroad, " 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' " *Barber* v. *Page, supra*, at 724, quoting with approval Judge Aldrich's dissent in the Court of Appeals, 381 F.2d 479, 481 (10th Cir. 1967).

New York urges that even if Holm's testimony was erroneously admitted in the 1964 trial, such error was harmless beyond a reasonable doubt within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967).[7] Relator answers that Judge Miller found Stubbs did not have effective assistance of counsel at his 1954 trial, so that his right of cross-examination may not have been satisfied

[6] See *California* v. *Green, supra*, at 167, footnote 16.

[7] See also, *Note, Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814 (1970).

even initially. Judge Miller's decision, however, even if it were binding on New York, would not establish the ineffectiveness of the cross-examination of Holm, but only the prejudice to the totality of defense preparation from late appointment of counsel.

Nevertheless, it is clear as Stubbs' 1964 counsel recognized that Holm was not questioned regarding the core of Stubbs' defense—namely, that while Stubbs originally forced himself on the Holms, he gained their sympathy during the course of the trip and in effect became their guest. This claim was significant because even if Stubbs fired his pistol accidentally (he denied firing at all), he might still be found guilty of felony murder unless the felony of kidnapping had ended. Stubbs' story was given some plausibility by his testimony that he forced himself on the Holms from desperation and hunger; they made him welcome when he explained his motivation; Mrs. Holm suggested he put his gun on the seat to avoid it being seen while driving through a town; and they drove past a policeman without the Holms making any outcry. While all of the above may also be explained by the Holms' fear of Stubbs, we cannot declare the absence of any examination of Holm—the only eye-witness to the alleged crime—on this point to be harmless beyond a reasonable doubt. Compare *Burgett* v. *Texas, supra,* at 115 with *United States ex rel. Moore* v. *Follette,* 425 F.2d 925 (2nd Cir. 1970). Whether the test is one of overwhelming evidence or of untainted evidence,[8] the error of admitting Holm's testimony at Stubbs' second trial was central to Stubbs' conviction, rather than harmless to his case.

The dissent makes an appealing case for using the Tennessee conviction to augment on the New York sentence.

[8] See 83 Harv. L. Rev. at 817-820.

It essentially employs the "bad man" approach. However, it fails to cite any cases to support such position and also fails to demonstrate where the cases relied upon here are either unearned or inappropriate.

MOORE, *Circuit Judge* (dissenting):

Here is presented an extraordinary example of "justice" dispensed by the federal courts. Stubbs, the appellant, released from a Texas penitentiary in June 1954, a few days later kidnapped at gunpoint in Tennessee a Mr. and Mrs. Holm and forced them to accompany him in their car. While on the road he murdered Mrs. Holm apparently "in cold blood" and attempted to murder Mr. Holm, wounding him twice. Stubbs was apprehended shortly thereafter at a roadblock. He tried to explain the blood on his clothing by attributing it to an accident while fishing. Stubbs was taken to the hospital to which Holm had been taken. There, in the presence of police officers and a doctor, Holm identified Stubbs as "the man that killed my wife and shot me."

Stubbs was indicted in the Criminal Court in Tennessee on July 8, 1954 and arraigned the next day, July 9, 1954. The Trial Judge immediately appointed three members of the County Bar to represent Stubbs. Although counsel moved for a continuance for additional time to prepare a defense (a practice not unusual for defense counsel), the trial was set for, and proceeded on, July 12, 1954.

In addition to other witnesses, Holm testified to the facts of the kidnapping, the murder of his wife and his own wounding. There is no indication in the record that Stubbs' counsel did not have a full opportunity to cross-examine Holm. The jury convicted Stubbs or four indictments,

murder in the first degree, assault with intent to murder and two counts of kidnapping. He was sentenced to concurrent terms of 99 years and 21 years.

Ten years passed. Stubbs by habeas corpus petition then advanced the claim in a federal court in Tennessee that his 1954 conviction should be set aside. The federal judge, in my opinion, quite erroneously, granted the petition on the ground that "the petitioner was denied effective representation by counsel" in that "Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial" and, declaring the first trial "null and void," remanded Stubbs for further prosecution.

On the second trial in 1964 the State called fifteen (15) witnesses, including the three (3) Highway Patrolman and a Police Investigator who were present in Holm's hospital room on June 11, 1954 and who testified to Holm's identification of Stubbs as the murderer and assailant. The testimony of another eye-witness who had died in the ten-year interval was introduced from the transcript. Holm had returned to Sweden where he was in residence. His 1954 testimony was also introduced from the transcript.

Again Stubbs was convicted of first degree murder and sentenced to twenty years and one day. The Supreme Court of Tennessee reviewed and affirmed the conviction. In an opinion by the Chief Justice, the court considered and ruled upon with approval the introduction of the Holm testimony from the transcript. There was, however, a modification of the sentence. Stubbs urged that he was entitled to a credit of his pre-trial imprisonment since 1954 and with this claim the court agreed.

How and why Stubbs was released from Tennessee is not revealed but 1966 finds him in New York State pur-

suing his calling and convicted in Monroe County of first degree assault and possession of a gun. Sentences (as a first offender) could have been imposed of sixteen to seventeen years. However, because of the 1964 Tennessee conviction, Stubbs was a second felony offender and, under New York Penal Law, § 1941 (then, and to this case on remand, currently, applicable), was subject to the sentence actually imposed of thirty-two to thirty-four years. Parenthetically, although not mentioned below, I see no reason why the County Court should not be able to consider the Texas conviction as a predicate to second offender treatment on any re-sentence.

All this background material, although not irrelevant to the issue before us, has caused the majority to divert its attention to Tennessee instead of to New York. Stubbs is not seeking relief from his Tennessee conviction as such but simply from its use to support a longer sentence for his subsequent New York conviction. The attack now made on the Tennessee conviction is purely collateral. On the merits I would hold that we should respect the decision of the Tennessee Supreme Court on the subject of the admission of Holm's 1954 testimony via the transcript.

Adverting momentarily to the merits of admitting Holm's transcript testimony, the facts definitely show, in contrast to widely differing facts in cases cited, that Holm was beyond the jurisdiction of the Tennessee courts even with federal aid. See *Barber* v. *Page*, 390 U.S. 719 (1908). Therefore, I do not find it necessary to restrict the permissive categories to death and connivance. Enough flexibility should exist in the law to consider the facts of each case in relation to availability and importance.

All of Stubbs' present arguments about lack of confrontation are but a smoke-screen. He and his counsel confronted Holm; his counsel cross-examined Holm; the issues

and facts were not complex. More important, however, is the fact that on the 1964 trial, many eye-witnesses and ear-witnesses testified. Stubbs undoubtedly would have been convicted wtihout the use of Holm's testimony. Of course it was important as an ingredient but so is almost all testimony placed in the category of harmless error. If harmless error be a factor on direct appeals, how much the more so should it be on collateral attacks!

In my opinion the able argument advanced by Stubbs' counsel has sought to divert us (and succeeded as to the majority) into paths of constitutional and hackneyed generalities. We all recognize the rights of confrontation and cross-examination. However, the many cases cited based on other and different facts are not dispositive here.

I would affirm the denial of the writ but at the very least would have the majority give more explicit instructions to the County Court on the possibility of regarding the Texas conviction as a predicate for the potential new sentence under § 1941 of the New York Penal Law.

Appendix D.—Decision of the United States District Court for the Western District of New York

UNITED STATES DISTDICT COURT

WESTERN DISTRICT OF NEW YORK

Civ. 1969-136

UNITED STATES ex rel. WILLIAM C. STUBBS

v.

VINCENT R. MANCUSI, Warden, Attica State Prison

Petitioner pro se.
Richard R. Jenczka, Assistant Attorney General of New York, for the respondent.

FINDINGS OF FACT

1. The petitioner is held on a judgment of Monroe County Court following a trial, where he was found guilty of the crimes of assault, first degree, and a violation of Section 1897, Subdivision 2 of the former New York Penal Law, a felony. He was sentenced on October 7, 1966 to a term of 19 to 20 years on the assault, first degree charge, and to a term of 13 to 14 years on the firearms charge, as a second felony offender, the sentences to run consecutively.

2. His claims in this proceeding are as follows: (1) The search which disclosed the revolver and other articles in the closed glove compartment of the defendant's automobile was unlawful; the evidence should have been suppressed. (2) The evidence offered as to both assault and

possession of a weapon was insufficient as a matter of law; the verdict was also against the weight of the evidence. (3) The police lieutenant was improperly permitted to testify to inflammatory conclusions made by him before the arrest; Mr. Wunder was permitted to give inflammatory hearsay testimony. (4) The erroneous instructions by the trial judge, although not excepted to, require a new trial. (5) The prosecuting attorney was improperly permitted to indulge in an inflammatory summation. (6) The trial judge committed prejudicial error by permitting the jury to take exhibits into the jury room, when the defendant refused to consent. (7) At the trial, to prove the defendant's identity as to a prior felony, the trial judge committed prejudicial error by refusing the defendant preemptory challenges in the selection of the jury. (8) The trial judge improperly disclosed to the jury trying the identity issue, the fact that the defendant stood convicted of a felony in New York. (9) The predicate conviction in Tennessee was unconstitutionally obtained and should not have been made the basis for increased punishment. (10) The sentence is too severe and should be reduced.

3. The conviction was affirmed by the Appellate Division, 30 A. D. 2d 377. Re-argument was denied, 30 A. D. 2d 932. The Court of Appeals of New York denied permission to appeal. Certiorari was denied February 24, 1969.

4. Pursuant to an order of this court dated April 21, 1969 the respondent has produced for this court's examination the record on appeal to the Appellate Division and the briefs of the respective parties in the Appellate Division. The presence of the petitioner was not required on the return of this order to show cause.

5. The petitioner has exhausted available state remedies. The papers produced are sufficient to allow this court

to determine the questions presented in this proceeding. There is no need for a further hearing.

6. On the evidence before me I find: (1) The search of defendant's automobile was lawful. It was incidental to a lawful arrest. The fruits of the search were properly received in evidence. (2) There was ample evidence to support the verdict of the jury both as to assault and to possession of a weapon. The verdict was not against the weight of the evidence. (3) There is no merit to petitioner's claim that the police lieutenant was improperly permitted to testify to inflammatory conclusions made by him before the arrest, and that Mr. Wunder was permitted to give inflammatory hearsay testimony. There were no erroneous instructions by the trial judge to the jury. (5) The summation of the prosecuting attorney was not inflammatory or prejudicial to the rights of the petitioner. (6) There was no error on the part of the trial judge in permitting the jury to take exhibits into the jury room, when the defendant refused to consent. (7) The petitioner's claim that, at the trial to prove the defendant's identity, the trial judge committed prejudicial error by refusing the defendant's preemptory challenges in the selection of the jury, presents no federal question. (8) There is no merit to the petitioner's claim that the trial judge improperly disclosed to the jury trying the identity issue, the fact that the defendant stood convicted of a felony in New York. (9) The predicate Tennessee conviction was not obtained in violation of petitioner's rights under the Federal Constitution. (10) The sentence was not excessive.

7. The conviction and sentence under attack in this proceeding was not obtained in violation of the petitioner's rights under the Federal Constitution.

Appendix D—Decision of the United States District Court for the Western District of New York.

CONCLUSION OF LAW

1. Petitioner's application for a writ of habeas corpus is denied upon the merits.

IT IS HEREBY SO ORDERED.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

HAROLD P. BURKE,
U. S. District Judge.

June 30, 1969.